No. 15–415

In The Supreme Court of the United States

ENCINO MOTORCARS, LLC,
PETITIONER

v.

HECTOR NAVARRO, MIKE SHIRINIAN, ANTHONY PINKINS, KEVIN MALONE, AND REUBEN CASTRO,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Service advisors at automobile dealerships meet and greet customers, write up their requests for automobile services, suggest additional work, and forward these work orders to other dealership employees. The Fair Labor Standards Act (FLSA) generally guarantees dealership employees time-and-a-half compensation for overtime, but exempts three enumerated types of dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A). In its 2011 final rule, promulgated after notice-and-comment rulemaking, the Department of Labor adhered to its position that service advisors do not fall within this exemption. 29 C.F.R. § 779.372(c); 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011).

The questions presented are:

When interpreting the FLSA's automobile salesman/partsman/mechanic exemption in accordance with *Chevron*:

1. Does the statutory exemption unambiguously apply or not apply to service advisors?

2. Is the Department of Labor's 2011 legislative regulation a permissible construction of the statute?

PARTIES TO THE PROCEEDING

Respondents Hector Navarro, Mike Shirinian, Anthony Pinkins, Kevin Malone, and Reuben Castro were plaintiffs in the district court and appellants in the court of appeals. Respondent Mike Shirinian was erroneously omitted from the caption of the court of appeals' opinion, although the court's opinion included his name in its discussion of the factual and procedural history. A motion to correct the caption is pending in the court of appeals.

Petitioner Encino Motorcars, LLC, was defendant in the district court and appellee in the court of appeals.

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INTRODUCTION

The Fair Labor Standards Act of 1938 (FLSA) guarantees nonexempt employees time-and-a-half pay for work beyond forty hours per week. 29 U.S.C. § 207 For several years beginning in 1961, the statute exempted all automobile dealership employees, but in 1966 Congress narrowed the exemption to three enumerated types of dealership employees: "salesm[e]n, partsm[e]n, or mechanic[s]." *Id.* § 213(b)(10)(A). The statute further limits the exemption to those employees who are "primarily engaged in selling or servicing automobiles." *Id.*

In 1970, in keeping with this enumeration, the Department of Labor (DoL) interpreted the statute not to exempt employees known as "service advisors." In 2011, after notice-and-comment rulemaking, DoL issued a final legislative regulation, adhering to its original position and declining to broaden this exemption to cover service advisors. DoL recognized that service advisors are neither car salesmen nor partsmen nor mechanics, and that they neither sell nor service cars, let alone "primarily" do so.

This is the first case in which a court of appeals has considered the statute's application to service advisors since DoL issued its 2011 legislative regulation. The court properly deferred, under *Chevron*, to DoL's delegated authority to implement the FLSA. *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The three allegedly contrary cases cited by petitioner all arose before the 2011 legislative regulation and thus presented a different

legal issue. Because the circuits do not disagree about the import of DoL's 2011 legislative regulation, there is no need for this Court to intervene. Moreover, those three cases (over the past forty-two years) either predated *Chevron* or did not apply this Court's *Chevron* precedent concerning the FLSA.

In any event, the importance of the decision below is greatly limited by the existence of another overtime exemption in the FLSA, which may apply elsewhere even when this one does not. And the skeletal record makes this case a poor vehicle. Further review is unwarranted.

STATEMENT

A. Statutory and Regulatory Background

1. *The FLSA Requires Overtime Pay for All Employees Except Those Specifically Exempted.* The FLSA's purpose is to "protect all covered workers from substandard wages and oppressive working hours." *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Thus, it generally requires employers to pay time-and-a-half for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). Congress exempted specific types of employees from this overtime-pay mandate. *See* 29 U.S.C. §§ 207, 213.

In 1961, Congress passed a blanket exemption from the FLSA for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles." Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 65, 73 (codified at 29 U.S.C. § 213(a)(19)

(1964)). Thus, all automobile dealership employees were exempt from the overtime-pay requirement, regardless of whether they were salesmen, receptionists, managers, mechanics, partsmen, accountants, car washers, or janitors.

2. *In 1966, Congress Narrowed the Automobile Dealership Exemption to Salesmen, Partsmen, and Mechanics.* Five years later, in 1966, Congress narrowed the exemption to three types of employees: "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 209, 80 Stat. 830, 836. In 1974, Congress re-enacted this provision without any germane change. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 14, 88 Stat. 55, 65 (adding exemption for boat salesmen and removing it for trailer and aircraft partsmen and mechanics).

Both the 1966 and 1974 statutes expressly authorized DoL to promulgate regulations implementing these amendments. *Id.* § 29(b), 88 Stat. at 76; Pub. L. No. 89-601, § 602, 80 Stat. at 844.

3. *DoL's 1970 Interpretive Regulation Declined to Exempt Service Advisors.* In 1970, DoL issued an interpretive regulation clarifying that service advisors do not qualify for the salesman/partsman/mechanic exemption: "Employees variously described as service manager, service writer, service advisor, or service salesman who are not themselves

primarily engaged in the work of a salesman, partsman, or mechanic . . . are not exempt under section 13(b)(10)." 35 Fed. Reg. 5856, 5896 (Apr. 9, 1970) (codified at 29 C.F.R. § 779.372(c)(4) (1971)). DoL noted that service advisors' main tasks of diagnosing automobiles' repair needs, writing up work orders, and assigning and supervising mechanics' work did not make them exempt. 35 Fed. Reg. at 5896. DoL explicitly described the 1970 rule as interpretive and did not promulgate it via notice-and-comment rulemaking procedures. *Id.* at 5856.

4. *In 2011, After Notice-and-Comment Rulemaking, DoL Declined to Read the FLSA Exemption to Apply to Service Advisors.* Following some lower court cases that had refused to defer to the 1970 interpretive rule, DoL issued nonbinding enforcement materials, declining for a time to enforce the FLSA's overtime provisions with respect to service advisors.[1] The agency noted that officially changing the agency's position to exempt service advisors would require revising the 1970 interpretive rule, but did not take formal action to change its position.

In 2008, DoL considered formally amending the 1970 interpretive rule to treat service advisors as

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[1] U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter No. WH-467, 1978 WL 51403 (July 28, 1978); U.S. DEP'T OF LABOR, WAGE & HOUR DIV., INSERT NO. 1757, FIELD OPERATIONS HANDBOOK 24L04–4(k) (1987). DoL counsels that it discloses its Field Operations Handbook to satisfy its obligations under the Freedom of Information Act, 5 U.S.C. § 552(a)(2), and that the Handbook "is not used as a device for establishing interpretative policy." *See* U.S. Dep't of Labor, Wage & Hour Div., *Field Operations Handbook*, U.S. DEP'T LAB., http://www.dol.gov/whd/FOH/ (last updated Aug. 13, 2013).

exempt and issued a notice of proposed rulemaking on the subject. 73 Fed. Reg. 43,654, 43,658–59, 43,671 (July 28, 2008). Five of the seven relevant comments opposed the proposed change. These included joint comments from twelve Members of Congress, including the chairs of the House Committee on Education and Labor; the Senate Committee on Health, Education, Labor, and Pensions; the House Subcommittee on Workforce Protections; and the Senate Subcommittee on Employment and Workplace Safety. George Miller (Chairman, House Committee on Education & Labor) et al., Comment Letter on Proposed Rule to Update Regulations Issued Under the FLSA (Sept. 26, 2008), at 7, http://tinyurl.com/qfrrfz9.

In 2011, after considering all of the comments submitted, DoL declined to broaden the exemption to include service advisors. It agreed with the majority of commenters that "the exemption should not be extended to employees outside its plain language," such as service advisors, who "merely coordinate" with exempt employees. 76 Fed. Reg. 18,832, 18,838 (Apr. 5, 2011).

Thus, after its notice-and-comment period, DoL "concluded that current [29 C.F.R. §] 779.372(c) sets forth the appropriate approach to determining whether [service advisors] are subject to the exemption." *Id.* In essence, the agency ratified its original interpretation and promulgated it as a legislative regulation.

The final regulation defines the three exempt types of employees, in relevant part, as follows:

> "[A] salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale *of the automobiles*, trucks, or farm implements that the establishment is primarily engaged in selling."
>
> "[A] partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts."
>
> "[A] mechanic is any employee primarily engaged in doing mechanical work in the servicing of an automobile, truck or farm implement for its use and operation as such."

29 C.F.R. § 779.372(c)(1)–(3) (emphasis added).

B. Facts and Procedural History

1. *Facts.* Respondents work (or worked) as service advisors for petitioner, a Mercedes-Benz auto dealership in the Los Angeles area. Compl. ¶¶ 9, 15, 18. Their job was to "meet and greet" customers, listen to their complaints, "evaluate the[ir] service and/or repair needs[,] solicit and suggest that supplemental service be performed," and "write up an estimate." *Id.* ¶ 16. Petitioner required them to work from 7 a.m. to 6 p.m. at least five days per week, totaling a weekly minimum of 55 hours. *Id.* ¶ 15.

2. *The District Court's Dismissal.* In 2012, respondents filed suit in federal district court, alleging various violations of the FLSA and state law. Count One, at issue here, alleged that petitioner violated

the FLSA by failing to pay them time-and-a-half for hours worked beyond forty per week. *Id.* ¶¶ 24–31. Petitioner moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime protections under § 213(b)(10)(A).

The district court acknowledged that "the statutory language of § 213(b)(10)(A) does not expressly exempt Service Advisors." Pet. App. 27. But, viewing DoL's regulation as "mere[ly] interpret[ive]" rather than legislative, the court "accorded [it] lower deference." Pet. App. 29. Because it saw service advisors as "functionally equivalent to salesmen and mechanics," the district court rejected the regulation as "unreasonable." *Id.* After dismissing respondents' other FLSA claims, the court declined to exercise supplemental jurisdiction over the remaining state-law claims. Pet. App. 29–31.

3. *The Court of Appeals' Reversal.* The court of appeals reversed the dismissal of the FLSA overtime claim. The court observed that "[petitioner] concede[d] that [respondents] do not meet the regulatory definitions" of salesmen, partsmen, or mechanics. Pet. App. 5. Since DoL had reaffirmed its position in 2011 after notice-and-comment rulemaking, the court of appeals evaluated the regulation under *Chevron*. Pet. App. 10–11.

At *Chevron* step one, the court rejected petitioner's argument that the statute unambiguously exempts service advisors on petitioner's theory that they are salesmen who service automobiles. Pet. App. 6–8. The court adverted briefly to this Court's canon of construing FLSA exemptions narrowly. Pet. App. 6 & n.3.

At *Chevron* step two, the court found DoL's interpretation of the statute reasonable and therefore entitled to deference. The noun "salesman," it noted, relates directly to the gerund "selling," but not to "servicing." Pet. App. 13–15. The court declined to follow decisions predating the 2011 legislative regulation, which had no reason to address, and had not addressed, the reasonableness of the 2011 regulation under *Chevron*. Pet. App. 11–12. Those decisions had not limited the exemption to the three statutorily enumerated types of employees. Instead, they had extended it to service advisors, either on the theory that their duties are "'functionally similar'" to those of salesmen, partsmen, and mechanics, or on the theory that service advisors are salesmen who sell services. Pet. App. 12–13 (quoting *Brennan* v. *Deel Motors, Inc.*, 475 F.2d 1095, 1097 (5th Cir. 1973), and citing *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004)).

The court of appeals thus unanimously reversed the dismissal of the FLSA overtime claim and supplemental state-law claims and remanded for further proceedings. Pet. App. 19. Petitioner filed a petition for rehearing en banc, but no judge requested a vote on it. Pet. App. 20.

REASONS FOR DENYING THE PETITION

Nothing about this case calls for this Court's intervention. DoL's 2011 legislative regulation, adopted after notice-and-comment rulemaking, tracks the plain meaning of the statutory salesman/partsman/mechanic exemption and is a reasoned interpretation of the statute. The decision below is the first to

interpret the 2011 legislative regulation, rests on a skeletal record, and is of limited importance, as industry commentators themselves acknowledge.

I. There is no division of authority. Of the three federal court of appeals and state supreme court cases (over the past forty-two years) cited by petitioner, none arose after the 2011 legislative regulation at issue here. Moreover, all of the federal cases predated either *Chevron* or this Court's precedent applying *Chevron* deference to FLSA exemptions under 29 U.S.C. § 213.

II. The decision below is correct. Congress delegated statutory authority to DoL to implement the FLSA Amendments' exemptions. After notice-and-comment rulemaking, the agency did so by promulgating the 2011 legislative regulation, 29 C.F.R. § 779.372(c). That legislative regulation qualifies for *Chevron* deference and is valid as a reasonable interpretation of the statute, 29 U.S.C. § 213(b)(10)(A).

A. At *Chevron* step one, the statute does not unambiguously exempt service advisors; if anything, it unambiguously does the opposite. The exemption covers only salesmen, partsmen, and mechanics primarily engaged in selling or servicing automobiles. Service advisors are not automobile salesmen, and selling services does not qualify as selling automobiles. Nor do service advisors service automobiles. Stretching "servicing" to include the "general process of servicing," as petitioner does (at 25, 26), would reenact the blanket automobile dealership exemption that Congress repealed in 1966. It is far more natural to read the statute as providing that salesmen sell automobiles but do not service them. This

Court's longstanding canon of narrowly construing FLSA exemptions simply reinforces the plain import of the text.

B. At *Chevron* step two, the legislative regulation is a valid, reasonable interpretation of the statute. After notice-and-comment rulemaking, DoL agreed with the weight of the comments and read the statute according to its natural meaning, rather than expanding it. It also acted reasonably in reaffirming its longstanding 1970 interpretive rule. Post-*Chevron*, DoL was no longer required to continue acceding indefinitely to pre-*Chevron* decisions that had refused to defer to the 1970 interpretive rule.

III. The question presented is of limited importance. Industry commentators have asserted that another FLSA exemption for specified employees, 29 U.S.C. § 207(i), may cover most service advisors regardless of whether § 213(b)(10)(A) does. In addition, the facts of this case are poorly developed, making it a poor vehicle. Finally, there is no danger of forum-shopping given the rigorous prerequisites for FLSA collective actions and the individualized showings necessitated by the possibility of the § 207(i) defense.

I. COURTS ARE NOT DIVIDED ON WHETHER DOL'S 2011 LEGISLATIVE REGULATION WARRANTS *CHEVRON* DEFERENCE

There is no division of authority on the pertinent question: whether, in a suit arising after DoL promulgated its 2011 legislative regulation, automobile dealership service advisors are exempt from the

FLSA's overtime requirement. The decision below is the only one to address that question. All three of the federal court of appeals and state supreme court cases cited by petitioner arose before 2011. Moreover, all of the federal cases predate *Chevron* itself or this Court's later precedent applying *Chevron* to DoL regulations implementing FLSA overtime exemptions. If faced with a post-2011 case involving service advisors again, all of these courts would be free to follow the decision below.

A. No Other Federal Court Has Addressed the Issue Since 2011, Nor Has Any Applied This Court's Recent *Chevron* Precedent on FLSA Exemptions

1. *The Fifth Circuit.* Petitioner claims that the decision below conflicts with the Fifth Circuit's 1973 decision in *Brennan* v. *Deel Motors*. Pet. 20 (citing *Brennan*, 475 F.2d 1095). Petitioner fails to acknowledge that *Brennan* was decided before *Chevron* and before DoL's 2011 legislative regulation. Thus, *Brennan* is no longer controlling precedent on the treatment of service advisors even in the Fifth Circuit.

In *Brennan*, the Fifth Circuit viewed "the intended scope of [29 U.S.C. § 2]13(b)(10) [a]s not entirely clear." 475 F.2d at 1098. Since this Court had not yet decided *Chevron*, and DoL had not yet engaged in notice-and-comment rulemaking on the status of service advisors, the Fifth Circuit mentioned DoL's 1970 interpretation of the overtime exemption only in passing, buried in a footnote. *Id.* at 1098 n.3. Instead of deferring to DoL, the court engaged in its

own analysis to determine its view of "the best interpretation of this section" of the statute, and "assume[d] that Congress intended to treat employees with functionally similar positions" alike. *Id.* at 1097–98. The court did not explain how to determine what positions were "functionally similar" to those enumerated in the statute.

After *Chevron* and DoL's 2011 legislative regulation, *Brennan* is no longer good law. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (emphasis added). *Brennan* was not based on statutory clarity; on the contrary, it found the scope of the statutory exemption "not entirely clear." 475 F.2d at 1098.[2]

2. *Fourth Circuit.* The only other federal appellate decision relied on by petitioner is likewise inapposite, because it predated the 2011 legislative regulation. It also does not survive later decisions of this Court.

In *Walton* v. *Greenbrier Ford*, the Fourth Circuit refused to afford *Chevron* deference to DoL's 1970 interpretation of the statutory exemption because it found that "29 C.F.R. § 779.372(c)(1) is interpreta-

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[2] The three mid-1970s, unpublished district court decisions cited by petitioner (at 21) all relied on *Brennan* and predated *Chevron* and the 2011 legislative regulation. Moreover, district court decisions cannot create a circuit split.

tive as it construes the statutory term 'salesman.'" 370 F.3d at 452. The Fourth Circuit instead applied a lesser standard of deference, which it had derived from a tax decision of this Court, *National Muffler Dealers*. *See Walton*, 370 F.3d at 452 (quoting *Pelissero* v. *Thompson*, 170 F.3d 442, 446 (4th Cir. 1999) (citing *Nat'l Muffler Dealers Ass'n, Inc.* v. *United States*, 440 U.S. 472, 476 (1979)).

Walton predated DoL's 2011 legislative regulation, however, and does not survive this Court's later decisions in *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158 (2007), and *Mayo Foundation for Medical Education & Research* v. *United States*, 562 U.S. 44 (2011). In *Long Island Care*, this Court unanimously rejected the argument that another DoL regulation, also interpreting an overtime exemption of the FLSA, should be afforded lesser weight as merely an "interpretive" regulation. 551 U.S. at 174. The Court explained that the FLSA provides the Secretary of Labor with the power to issue "rules and regulations." *Id.* at 165. *Chevron* deference is warranted, the Court concluded, "[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable." *Id.* at 173.

Reaffirming *Long Island Care*, this Court in *Mayo Foundation* held that the lesser standard of deference set forth in *National Muffler Dealers Association* no longer applies, even in the context of tax regulations adopted by the Treasury Department af-

ter notice-and-comment rulemaking. 562 U.S. at 58 (quoting *Long Island Care*, 551 U.S. at 173).

The Fourth Circuit has not revisited the application of the FLSA's overtime provisions to service advisors since *Long Island Care*, *Mayo Foundation*, and the 2011 notice-and-comment rulemaking, which gave 29 C.F.R. § 779.372(c) the status of a legislative regulation. There is thus no divergence in federal authority for this Court to resolve.

B. There Is No Conflict with Any State Supreme Court

The only state-court authority cited by petitioner likewise arose before the 2011 legislative regulation took effect. In *Thompson* v. *J.C. Billion, Inc.*, the plaintiff worked as a service manager at an automobile dealership from March 2009 through July 2010 and filed his complaint several months later. 294 P.3d 397, 398–99 (Mont. 2013). Thus, the Montana court had no occasion to consider or accord any weight to the 2011 rulemaking, because the actions complained of predated 2011.

Neither party in *Thompson* briefed or argued whether the 2011 regulation could be applied retroactively and thus merited independent weight. Nor did the Montana Supreme Court discuss retroactivity. The sole mention of retroactivity was of a distinct retroactivity concern in an amicus brief, which urged that it would be "unfair to retroactively apply a standard to dealers." Brief of Amicus Montana Automobile Dealers Ass'n at 10–11, *Thompson* v. *J.C. Billion, Inc.*, 294 P.3d 397 (Mont. 2013) (No. DA 12-0244) (citing *Bowen* v. *Georgetown Univ. Hosp.*,

488 U.S. 204 (1988) (articulating a strong presumption against applying regulations retroactively)). The Montana Supreme Court did not consider the 2011 legislative regulation as an independent basis for deciding the case. Rather, the court described the 2011 rule as a "subsequent[] expla[nation]" of the 1970 rule and a "rever[sion] back to the [1970] position." 294 P.3d at 401, 403 n.7.

Since the 2011 regulation could not have applied retroactively in *Thompson*, the question presented here was not properly before the Montana Supreme Court. Petitioner has not cited, and we are not aware of, any other state court decision on the applicability of the salesman/partsman/mechanic exemption to service advisors since 2011.

II. THE COURT OF APPEALS CORRECTLY DEFERRED TO DOL'S 2011 NOTICE-AND-COMMENT DETERMINATION THAT SERVICE ADVISORS ARE NOT EXEMPT

In 2011, after notice-and-comment rulemaking, DoL properly declined to extend the FLSA's salesman/partsman/mechanic exemption to cover service advisors. 76 Fed. Reg. at 18,838. The court of appeals correctly deferred under *Chevron* to DoL's expertise and delegated authority to implement 29 U.S.C. § 213(b)(10)(A).

Petitioner's arguments fail in part because they rest on two fundamental misconceptions. Petitioner claims, first, that DoL lacks authority to implement § 213(b)(10)(A), and, second, that the 2011 rulemaking did not result in a legislative regulation. Pet. 29. Both claims are wrong.

First, both the 1966 and 1974 FLSA Amendments, which respectively enacted and reenacted the automobile salesman/partsman/mechanic exemption, gave the Secretary of Labor authority "to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act." Pub. L. No. 89–601, § 602, 80 Stat. at 844; *accord* Pub. L. No. 93–259, § 29(b), 88 Stat. at 76; *see Long Island Care*, 551 U.S. at 165 (relying on the latter subsection). Whether an agency interpretation warrants full *Chevron* deference "does not turn on whether Congress's delegation of authority was general or specific." *Mayo Found.*, 562 U.S. at 57.

Second, DoL's 2011 rulemaking was not merely "interpretive" and so subject to less than full *Chevron* deference. Pet. 29. In *Long Island Care*, this Court unanimously held that DoL's notice-and-comment regulations concerning another overtime exemption (29 U.S.C. § 213(a)(15)) merit full *Chevron* deference. 551 U.S. at 171–74. Considering that "Congress delegated authority to the [DoL] generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," with full notice-and-comment procedures, the court of appeals properly applied *Chevron*'s framework. *United States* v. *Mead*, 533 U.S. 218, 226–27 (2001); *accord id.* at 229–31 (explaining that notice-and-comment rulemaking is "significant in pointing to *Chevron* authority").

Under *Chevron*, unless "[1] Congress has directly spoken to the precise question at issue, [2] the question for the court is whether the agency's an-

swer is based on a permissible construction of the statute." 467 U.S. at 842–43. Here, the court of appeals correctly deferred to DoL's 2011 legislative regulation under *Chevron*, rejecting petitioner's arguments at both step one and step two. Indeed, the court of appeals would have been justified in ruling for respondents at *Chevron* step one.

A. The Plain Text of the FLSA's Overtime Exemption for Salesmen, Partsmen, and Mechanics Does Not Unambiguously Cover Service Advisors

1. At *Chevron* step one, the court of appeals correctly rejected petitioner's argument that § 213(b)(10)(A) unambiguously exempts service advisors from the FLSA's overtime requirement. Out of dozens of automobile dealership jobs, including porters, painters, upholsterers, leasing agents, title examiners, car washers, and warranty salesmen, Congress explicitly listed three, and service advisor is not one of them. Moreover, the classification of service advisors was well-established in the industry when Congress enacted the exemption in 1966. U.S. DEP'T OF LABOR, *Automobile Service Advisors*, *in* OCCUPATIONAL OUTLOOK HANDBOOK, BULLETIN NO. 1450, at 314–17 (1966–67 ed.).

That should end the matter, based on the canon *expressio unius est exclusio alterius*. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S.

19, 28 (2001) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

This is a textbook example of Congress's selecting and enumerating certain "members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)). Particularly since Congress repealed the 1961 exemption covering all dealership employees and substituted one limited to just three enumerated types of employees, it would contradict Congress's manifest intent to expand its carefully enumerated list.

2. Petitioner erroneously asserts, however, that service advisors are clearly covered by the exemption because they are supposedly "salesmen." Pet. 23–24. Even if this reading were not clearly wrong, at most the statute would be ambiguous on this point. In common parlance, a *sales*man is one who *sells* something, making a *sale*; both the nouns and the transitive verb share the same etymological root, **saljan*. *See* 14 OXFORD ENGLISH DICTIONARY 391, 934, 388 (2d ed. 1989); 4 WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2204, 2272, 2203 (2d ed. 1956) (hereinafter "WEBSTER'S SECOND").

The direct object of the gerund "selling" in the statute is "automobiles"; the statute does not exempt employees primarily engaged in selling leases, warranties, insurance, underbody coatings, or—as petitioner would have it—services. *See, e.g.*, *Chao* v. *Rocky's Auto, Inc.*, No. 01–1318, 2003 WL 1958020, at *1, *4–*5 (10th Cir. Apr. 25, 2003) (unpublished)

(declining to exempt finance managers as salesmen because they sell extended warranty options, not cars); *Gieg* v. *Howarth*, 244 F.3d 775, 776-77 (9th Cir. 2001) (same, for finance writers, because they sell financing and warranties, not cars). Petitioner's own amicus has explained that "[e]mployees primarily engaged in automobile leasing **are not *salesmen*** under this exemption, since they are not selling vehicles to ultimate purchasers." NAT'L AUTO. DEALERS ASS'N, A DEALER GUIDE TO THE FAIR LABOR STANDARDS AND EQUAL PAY ACTS 12 (2005) (emphases in original). DoL's regulation has not "divided a dealership's salesforce in half," as petitioner argues (at 2); the statute itself limits "salesmen" to employees "selling automobiles." 29 U.S.C. § 213(b)(10)(A).

3. Nor can one stretch the statutory phrase "servicing automobiles" to mean "sell[ing] services," as petitioner would have it. Pet. 2, 31. The Oxford English Dictionary's *first* definition of "servicing" is "[t]he action of maintaining or repairing a motor vehicle, etc." 15 OXFORD ENGLISH DICTIONARY 39 (2d ed. 1989); *see also* 4 WEBSTER'S SECOND 2288 ("To perform services of maintenance, supply, repair, installation, distribution, etc. for or upon; as, to *service* a car, a radio set, a ship, a territory.").[3]

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[3] Other dictionaries likewise list this as the first definition of the transitive verb "service." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1304 (1966) ("[T]o make fit for use; repair; restore to condition for service: *to service an automobile.*"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1185 (1981); GARNER'S DICTIONARY OF LEGAL USAGE 811 (3d ed. 2011) ("'[T]o provide service for' <the mechanic serviced the copying machine>").

Congress has repeatedly used this common-sense definition of "servicing" in the United States Code. In a statute regulating the Senate garage, for example, "the term 'servicing' includes, with respect to an official motor vehicle, the washing and fueling of such vehicle, the checking of its tires and battery, and checking and adding oil." 2 U.S.C. § 2025(b); *see also, e.g.*, 42 U.S.C. § 7671h(c) ("[N]o person repairing or servicing motor vehicles . . may perform such service unless such person has been properly trained and certified."). Yet petitioner claims, counterintuitively, not just that salesmen *can* service automobiles, but that the statute *unambiguously includes* the unlikely category of "salesmen primarily engaged in servicing automobiles." Pet. 23–24. It is far more natural to read the statute as recognizing that salesmen sell automobiles, and other employees service automobiles.

4. Petitioner mischaracterizes DoL's reasoning as improperly injecting the word "personally" into § 213(b)(10)(A). Pet. 25–26. But the word "personally" appears nowhere in the 1970 or 2011 regulation or preamble. The court of appeals used "personally" only in passing, to emphasize that the regulation comports with the plain meaning of "servicing." Pet. App. 13.

Rather, it is petitioner who asks this Court to inject a new element into the statute to exempt service advisors, on the theory that they are part of the "process," "process of," or "general process of" servicing automobiles. Pet. 1, 2, 3, 10, 15, 24, 25, 26. Petitioner's reading would effectively reinstate the 1961 blanket dealership exemption that covered all of a

dealership's employees, even though Congress repealed that exemption in 1966. Nearly everyone in a dealership is part of the "general process of" sales or service, including managers, accountants, receptionists, cashiers, cleaning crews, lot attendants, and advertising and marketing employees. But instead of maintaining the exemption for all of them, Congress deliberately limited the exemption to the three enumerated types of employees.

5. Petitioner claims that exempting partsmen but not service advisors would create an "anomaly," on the unsupported and incorrect assertion that "partsmen who personally service automobiles is a null set." Pet. 26. This objection misses the mark. This case is about service advisors, not partsmen, and partsmen are explicitly named in the exemption, while service advisors are not. So whatever supposed "anomaly" might result relates to the inclusion of partsmen, not the exclusion of service advisors.

Moreover, unlike service advisors, partsmen may in fact service automobiles. As DoL recognized in 1966 (when Congress narrowed the exemption), partsmen, who generally stock and dispense parts, may also inspect cars to identify parts needing replacement, "use micrometers, calipers, fan-belt measures, and other devices to measure parts for interchangeability," physically modify parts for replacement, and repair and replace specific parts, "using equipment such as brake riveting machines, brake drum lathes, valve refacers, and engine head grinders." U.S. DEP'T OF LABOR, *Automobile Parts Countermen, in* OCCUPATIONAL OUTLOOK HANDBOOK, BULLETIN NO. 1450, at 312–13 (1966–67 ed.). Me-

chanics and sometimes partsmen service automobiles (and have the grease under their fingernails to prove it), while service advisors do not.

6. Petitioner insists that the conjunction "or" means that each noun must be paired with each verb—that salesmen, partsmen, and mechanics can each sell *or* service automobiles. Pet. 27–29. But that is not even a natural reading, let alone the only possible reading, of the text. As the court of appeals noted, any reader of the phrase "dogs or cats are barking or meowing" would understand that only dogs bark, while only cats meow. Pet. App. 14. A "natural reading of the [FLSA] text strongly suggests that Congress did not intend that both verb clauses [selling and servicing] would apply to all three subjects." Pet. App. 14. It is far more natural to understand that salesmen sell automobiles, as the words' shared etymology confirms. At the very least, the statute does not foreclose this natural reading.

7. Finally, the court of appeals briefly and correctly noted this Court's canon "that courts should construe the FLSA's [§ 213] exemptions narrowly" in favor of employees. Pet. App. 6 & n.3 (citing *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), in turn relying on *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959) (Harlan, J.)). Petitioner attacks this canon (at 32–33) while ignoring this Court's precedents establishing it. Such canons of construction are quintessential "traditional tools of statutory construction" required at step one of *Chevron*. 467 U.S. at 843 n.9; *accord City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in the judgment).

8. In short, at *Chevron* step one, the statute does not unambiguously exempt service advisors. If anything, the plain language of the statute compels the conclusion, reached by DoL and consistently stated in its regulations, that service advisors are *not* exempt from the FLSA's overtime requirement.

B. DoL Reasonably Declined to Expand the Statutory Exemption to Service Advisors

Even if the statute permitted petitioner's countertextual reading of the salesman/partsman/mechanic exemption, it would hardly compel it or make the contrary conclusion unreasonable. At *Chevron* step two, the court of appeals correctly upheld DoL's interpretation of § 213(b)(10)(A) as reasonable. The agency's view "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

1. Based on the text of the exemption and the comments it received during rulemaking, DoL's 2011 final rule reaffirmed the agency's original reading of the statute "as limiting the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles." 76 Fed. Reg. at 18,838. DoL agreed with comments that the exemption "'requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle '" *Id.* (quoting comment). DoL further agreed with other comments that "'neither integration with exempt employees nor the performance of functions related to those of exempt employees qualifies an

employee as one who is *primarily engaged in either selling or servicing vehicles*.'" *Id.* (quoting comment). As twelve leading Members of Congress commented, the exemption does not include "salesmen who sell services." *Id.*; George Miller et al., Comment Letter, at 7–8, http://tinyurl.com/qfrrfz9.

2. DoL also acted reasonably in 2011 in reaffirming its longstanding 1970 interpretive rule. Rather than changing its regulation in 1978 or 1987, DoL had indicated in nonbinding documents that it would decline to enforce this portion of the regulation, after some pre-*Chevron* decisions had (erroneously) determined that the agency's interpretation was not "the best." 76 Fed. Reg. at 18,838; *Brennan*, 475 F.2d at 1097. The purpose of the later notice-and-comment rulemaking was to take a closer, more comprehensive look at the issue.

Regardless, a change in its approach would be immaterial to the 2011 regulation's validity. Under *Chevron* step two, agencies are free to change their positions as long as they provide reasoned explanations for doing so. In *Brand X*, this Court clarified that "a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." 545 U.S. at 983. After *Brand X*, DoL was not required to continue acquiescing in the Fifth Circuit's pre-*Chevron* reading of the statute. And contrary to petitioner's claim (at 17, 18, 33, 34), there is nothing "retroactive" about applying the 2011 legislative regulation to post-2011 conduct. *Long Island Care*, 551 U.S. at 170–71.

3. A service advisor's compensation by commission does not make him ineligible for overtime. *Con-*

tra Pet. 30–31. While the FLSA does "exclud[e] *certain* employees of retail or service establishments," Pet. 31 (emphasis added), it contains no blanket exemption from overtime pay for all commission-based employees. On the contrary, employees are exempt only if they fall within a statutory exemption. One such exemption is the salesman/partsman/mechanic exemption. Another such exemption requires that their employers show that they (a) work for a "retail or service establishment"; (b) receive more than 150% of the minimum hourly wage; and (c) receive more than half of their compensation as "commissions on goods or services" over a "representative period" of at least a month. 29 U.S.C. § 207(i). Commission-based employees who do not satisfy these requirements, such as those paid a percentage of regularly predictable sales with only a small increment for sales above their expected sales, are entitled to overtime pay. 29 C.F.R. § 779.416(c). And to qualify for enumerated exemptions such as § 207(i), employers must not only satisfy the statutory prerequisites, but also document them by keeping appropriate records. 29 C.F.R. § 515.16.

Nor does employers' "negotiated" compensation with employees, Pet. 3, 17, 30, 33, 34—in the sense of having hired employees on terms inconsistent with the FLSA—have any relevance. Employers cannot evade the overtime requirement by paying employees on a piecework or commission basis; unless employees fall within an enumerated exemption, they are entitled to overtime.

Rather than expanding § 213(b)(10)(A) to negate § 207(i)'s requirements and recordkeeping, DoL act-

ed reasonably in requiring employers to meet § 207(i)'s specific requirements for employees paid on commission.

III. THE QUESTION PRESENTED IS OF LIMITED SIGNIFICANCE, AS INDUSTRY COMMENTATORS ACKNOWLEDGE, AND THIS CASE IS A POOR VEHICLE FOR ADDRESSING IT

1. Any decision in this case would have limited effect. According to petitioner's amicus (at 7), service advisors may be exempt from overtime pay under a different FLSA exemption, § 207(i). As an industry website asserts, "[c]onsidering that most dealerships pay their service advisers using some sort of commission or flat-rate pay plan specifically designed to qualify the service adviser for the [§ 20]7(i) commissioned sales exemption, the *Navarro* decision likely affects very few, if any, employers." John Huetter, *Sky NOT Falling on Overtime for Service Advisers, Auto Body Estimators after* Navarro, REPAIRER DRIVEN NEWS (Apr. 22, 2015), http://tinyurl.com/qxpc3kj. As a law firm reassured its automobile dealership clients, the decision below need not occasion "panic," because "[m]any, if not most, auto dealerships already use commission pay structures for service advisors that comply with Section 207(i)." Scali Law Firm, Navarro *Decision Should Have Little Effect on California Auto Dealers* (Mar. 29, 2015), http://tinyurl.com/ngvbceu.

Furthermore, only four federal court of appeals or state supreme court precedents have addressed this issue over the last forty-five years, and only one (the decision below) has done so since the 2011 legis-

lative regulation. The paucity of precedent underscores that the questions presented are hardly ones of national concern.

2. Moreover, the skeletal record makes this case a poor vehicle. The district court granted petitioner's motion to dismiss before any discovery took place. This Court would thus lack concrete evidence contextualizing service advisors' roles and responsibilities within a particular auto dealership.

3. Finally, petitioner's dire predictions about forum-shopping and nationwide FLSA collective actions are unwarranted. *Contra* Pet. 18, 22, 35. FLSA plaintiffs in collective actions must not only affirmatively opt in, but also bear the burden of proving that they are "similarly situated." 29 U.S.C. § 216(b). District courts within the Ninth Circuit enforce this burden rigorously, decertifying plaintiffs' classes unless they can "provide[] substantial evidence that their claims arise out of a single policy, custom, or practice that led to FLSA violations." *Beauperthuy* v. *24 Hour Fitness USA, Inc.*, 772 F. Supp. 2d 1111, 1118, 1122 (N.D. Cal. 2011) (collecting citations); *accord Reed* v. *Cty. of Orange*, 266 F.R.D. 446, 449–50 (C.D. Cal. 2010). Because automobile dealerships are often autonomous and the industry is splintered, collective actions are unlikely to remain certified. *See Brewer* v. *Gen. Nutrition Corp.*, No. 11–CV–3587, 2014 U.S. Dist. LEXIS 159380, at *54 (N.D. Cal. Nov. 12, 2014) ("[E]mployees are not similarly situated in that they are required to work unpaid overtime, if at all, as a result of individual managers' decisions as opposed to a single corporate policy.").

This obstacle is compounded by the possibility that defendants may raise § 207(i) as an affirmative defense to collective action certification. Section 207(i) "is a highly individualized defense because its application requires week-by-week and other periodic calculations specific to each individual Plaintiff and his or her particular circumstances." *Beauperthuy*, 772 F. Supp. 2d at 1126 (internal quotation marks omitted); *accord id.* at 1132–33. "The need for such individualized inquiries would make proceeding by representative testimony impracticable," even against a single nationwide corporate defendant. *Id.* at 1127–28. Thus, district courts within the Ninth Circuit have decertified FLSA collective actions that may implicate § 207(i). *Id.* at 1134–35. Petitioner cites no contrary evidence of a rush to file or transfer FLSA suits into the courts below. Petitioner's floodgates fears are groundless.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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